

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MERIT CONTRACTING, INC.

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 66, AFL-CIO

Cases 6-CA-28848
6-CA-28886 and
6-CA-28913

Barton Meyers and Clifford Spungen, Esqs.,
for the General Counsel.
Allan L. Fluke and Thomas E. Weiers, Jr., Esqs.,
of Pittsburgh, Pennsylvania,
for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Pittsburgh, Pennsylvania, on November 17 through 21 and December 8, 1997. Briefs were filed and a decision was issued on April 24, 1998.

On March 12, 2001, the Board issued its decision in the matter in *Merit Contracting, Inc.*, 333 NLRB No. 64 in which it affirmed certain rulings, findings and conclusions but otherwise reversed my granting of the Union's motion to quash the subpoena with respect to nine remaining discriminatees, and remanded the issue of the applicants' qualifications for evaluation consistent with the Board's decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20.

On March 22, 2001, the parties were invited to file supplemental briefs addressing the issues set forth in the Board's remand, specifically addressing the framework of the *FES* decision as it applies to the record in this case. The Union also was requested to make the information sought in the subpoena available to the Respondent by April 16, 2001. The General Counsel also was ordered to prepare and communicate to the parties a proposed settlement agreement on or before April 30, 2001, and the parties were instructed to thereafter diligently pursue a settlement agreement and notify me of the result of these efforts on or before May 14, 2001. Otherwise, the parties were given until May 29, 2001, to file supplemental briefs.

Subsequently, supplemental briefs were filed by the General Counsel and the Respondent. On brief the General Counsel reviews the Board's *FES* criteria and argues that the testimony of the alleged discriminatees and other evidence presented at the original hearing in this matter establishes that the applicants were fully qualified for the positions available for hire by Respondent as reflected in its newspaper advertisements soliciting applicants for the position; that the Employer has not adhered uniformly to any set of requirements for hire to the positions in question and that the assertion that any discriminatee was denied employment for lack of qualifications is pretextual.

The General Counsel also contends that a close reading of my prior Decision indicates that the Respondent's asserted reliance on its wage policy as a rationale for rejecting the alleged discriminatees is in fact pretextual and that the applicants' wage history or wage demand was only one example of the variety of excuses Respondent advanced in attempting to justify its refusal to hire the discriminatees. The General Counsel thus asserts that the overall evidence shows that the Respondent's failure to hire any of the nine alleged discriminatees were pretextual and discriminatory without reference to or reliance on the disputed finding that Respondent's wage policy was in itself "inherently destructive" of their employee rights and thus proof of antiunion animus.

The General Counsel also notes that the *FES* framework is a departure from prior Board precedent which did not require the General Counsel to show as part of its initial burden that applicants had experience or training relevant to the announced or generally know requirements of the position but rather left this issue of qualifications to the compliance stage but that now the documents subpoena concerning what equipment, the alleged discriminatees have been certified to operate by the Union's apprenticeship program as well as documents relating to the content and requirements of that program would now be relevant during the trial on the merits and advises that in accordance with my direction on remand, the Union has provided all of the subpoenaed material to Respondent as of April 16, 2001.

On brief the Respondent first contends that the issue of its consideration of "union wages" and wage compatibility is not evidence of antiunion animus and it argues that the General Counsel has not shown that antiunion animus contributed to its decision not to hire the alleged discriminatees. It also asserts that the General's Counsel failed to establish that the applicants had experience or training relevant to the positions or to show the Respondent would have found each of the alleged discriminatees qualified for employment. It states that it requests a reopening of the hearing on the case to present its proofs, as well as to cross examine based on applicants' qualifications and the subpoenaed records.

The Respondent, while agreeing that the Charging Party "substantially" complied with its subpoena request, also contends that it did not "fully comply," however, no specific omissions are offered. It also does not indicate what relevant evidence would likely be obtained by further cross examination of the alleged discriminatees or what additional proofs it would present with its own witnesses. As indicated below, I find that much of employer's generalities and speculations concerning most of the applicant's "qualifications" are pretextual and I otherwise find that any such additional evidence is "unnecessary" to make a fair evaluation of the issues under the *FES* criteria in response to the Board's remand. In this connection it is noted that I previously evaluated the existing record under the basic causation test for cases turning on employer motivation, citing *Wright Line*, 251 NLRB 1083 (1980), *NLRB v. Transportation Management Corp.*, 462 US 393 (1983), the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-87 (1941) and the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) and *KRI Constructors*, 290 NLRB 802, 811 (1988), and case cited therein. I also specifically recognized the "qualifications" issue by stating:

The qualifications of a job applicant may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary ----- that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which an employer is seeking or accepting applications.

The latter evaluation has been isolated and amplified in the new *FES* criteria as a specific requirement that the General Counsel must first show:

- 5 (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire.

Discussion

10 In *FES*, supra, the Board held that in order to establish a discriminatory refusal to hire, the General Counsel must first show:

- 15 (1) that the respondent was hiring, or had concrete plans to hire, at the time or the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination, and (3) that antiunion animus contributed to the decision not to hire applicants.

20 Once this established, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity of affiliation.

25 In its decision remanding these matters, the Board otherwise affirmed those of my prior rulings, findings and conclusions that are consistent with its decision. In addition, it found that the Respondent also had violated Section 8(a)(1) of the Act by implicitly threatening operator Rodgers because of his protected concerted activity in circulating a petition on behalf of other employees, regardless of the fact that Rodgers' activity was not an activity on behalf of the Union. Under these circumstances, I adopt the Board's affirmation and its additional finding. I also adopt my prior findings of fact, discussion and conclusions of law as set forth in the prior decision and I otherwise find that good cause is not shown that would require reopening of the record.

30 A. *Criteria (1), Hiring Plans:* John Hilty is the Respondent's human resources director and he testified extensively about his and the company's relevant hiring activities. The company generally has between 75 and 160 employees, excluding office employees and its standard procedure is to run newspaper ads and to collect and review application for new hires.

As noted in the prior decision:

40 In the fall of 1996, 84 Lumber Company, a national wholesaler and retailer of lumber and building supplies, contracted with Respondent to build or expand stores at locations in several eastern States. Because of the projected need for additional employees to complete this anticipated work, it placed help wanted advertisements in various newspapers in southwestern Pennsylvania and in New York. The ads sought equipment operators; crane, dozer, backhoe and highlift operators; as well as concrete carpenters and finishers; and ironworkers.

45 On December 3, 1996, shortly after the ads appeared in the newspapers, members of the Union began filing applications with the Respondent for positions as equipment operators.

Hilty testified that he ran the ad again after the first 2 week run in late November because he didn't get a sufficient response. Yet the Respondent acted inconsistently with this assertion by failing to act on as many as eight applications it received from union applicants between December 3 and 11.

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Originally, management were talking about hiring nine crews, each with four or five operators and late in 1996, Hilty was directed to get people "interviewed, physical[ed], [and] prepared to go to work" but he asserts that he had problems hiring qualified employees and having them available when they were needed. In December, owner Clem Gigliotti, directing that he set up "benches," or panels, with at least 10 individuals on them who had completed their interviews and physicals, and were ready to go to work. Gigliotti told Chuck Rush, "not to wait until the last minute to do their interviews. And to run through the interviews and put, say 10 men on the bench like you would a ball team, to be ready to go when needed." On January 24 he had an operators bench list of 13 names, 3 of which were for foreman/supervisor positions and one was listed as a foreman/operator. Three of these declined the job before physicals were set and one, Robert Barganti, was hired as a supervisor.

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Here, management's memo to Hilty called for him to interview and have 10 operators "ready to go to work", however, only six were processed to the physical stage where they were on the "bench" at the end of January. Apparently, no additional applications of union or other individuals, were reviewed to bring the bench up to strength. Moreover, in February and March, the Respondent proceeded to hire Rodgers and Goughenour (who appeared to be nonunion applicants) as well as eight other operators who did not go through the panel process and it ignored the bench (and Turner), except for Barzanti who immediately was hired as a foreman/operator without a physical. Previously, three other operators, plus Ralph Bailey also were hired in December and January without going through the "bench" procedure and six or more other "non-bench" operators in addition to Rodgers and Goughenour were hired in February and March.

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In its supplemental brief the Respondent notes that much of the anticipated work for 84 Lumber did not materialize, however, in late 1996 and early 1997, when the alleged discriminatee submitted their applications the Respondent still anticipated that it would get this work and between December 1, 1996, and March 30, 1997 it hired approximately 13 operators. Accordingly, I find that the record clearly shows that the Respondent was hiring and had concrete plans to hire at the time of the alleged unlawful conduct.

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B. Criteria (2), Applicant Experience. Each of the nine alleged discriminatees, except Eutsey and Whipkey, stated on their applications that they had completed training at the Operating Engineers Trade School (Eutsey noted he was "attending" and Whipkey was in his second year of training). Each applied for a position as "operator," "equipment operator" or "heavy equipment operator" in keeping with the description in the Respondent's ads. Each listed two or three union contractors as former employers (several listed as \$19 per hour figure as their rate of pay for some of these jobs and their testimony indicated that this was the approximate union scale or "union wage" at that time). Each testified extensively about their

experience, training and the equipment they were qualified to operate including cranes, dozers, backhoes and high lifts, as specifically mentioned in the Respondent's ads.

Hilty testified that he would take a better look at applications and look at an applicant's experience only when he was about to set up interviews, as he did with minority applicant Turner who was the only overt union affiliated applicant to be interviewed. Turner and covert applicants Goughenour and Rodgers, each listed their experience as operator. Applicants Goughenour and Rodgers had qualification similar to the union applicants, they were promptly hired and they successfully performed their equipment operating assignment after they were hired.

As noted in the prior decision:

Moreover, when the Respondent's owner, Clement Gigliotti, testified that he never instructed his staff not to hire union personnel, he specifically added that he probably preferred Union people because he believes that 70 percent of them would be "qualified" as compared with 20 percent for applicants "off the street." Accordingly, Hilty's described practices in the winter of 1996-1997 appear to be inconsistent with the Respondent's usual evaluation of an applicant's suitability.

Under these circumstances, I find that the General Counsel has shown that the nine relevant applicants had the experience or training relevant to the announced or generally known requirements of the position for hire.

C. Criteria (3), Motivation: In the prior decision I concluded my evaluation of the record pertaining to the union animus by stating as follows:

I also find that the expressed disqualifying criteria for the Respondent's screening of applications (past experience at union wages), effectively precludes consideration of an entire class of applicant and it constitutes discriminatory conduct and is a practice inherently destructive of important employee rights. Accordingly, I find that animus is implicit and can be found here even without specific proof of antiunion motivation, see *Merit Constructors*, supra, and *Great Dane Trailers*, 338 U.S. 26, 34 (1967).

The Board stated in its remand that:

The judge appeared to rely primarily, if not exclusively, on this finding in concluding that the General Counsel had established that the Respondent's rejection of the nine applicants was unlawfully motivated.

that conclusion, however, was not my intention and the "implicit" finding was meant to be supplemental to and to buttress my other findings. Thus, in addition to the above implicit finding and the conclusion that Local 66 union applicants were excluded from the Respondents hiring process, the record also provides other facts, which can be relied on to show antiunion animus.

In my prior decision I also found as follows:

The Respondent points out that in 1991, it entered into a project agreement with Local 66, on a Sony plant project and that in its second year of operation, it entered into a collective bargaining relationship with the UMW for all of its mine

sites and prevailing rate work. Chuck Rush testified that, currently, a majority of its employees are members of the UMWA, that it traditionally has hired members of labor organizations, that Les Trbovich and Gary Greedan, who both testified that they were working at Merit's Kelly Run jobsite with Goughenour, were members of the USWA and the UMWA, respectively, that it hired USWA members Rasel, Tedrow, and Donley as equipment operators for the 84 Lumber jobs. Accordingly, it argues that the general counsel failed to establish that Merit possessed union animus and that such animus contributed to the decision not to hire the 13 "salts," citing *Bay Control Services*, 315 NLRB 30 (1994).

Although the Respondent had a past project agreement and some affiliation with other union and other employees with some Union membership the issue here is of a more narrow focus, one that must look at its hiring practices when it was directly faced with an active organizational drive and applications for employment by a rush of numerous union operators in response to its ads. See *J.E. Merit Constructors*, 302 NLRB 301, 304 (1991). Here, shortly after the alleged discriminatees started to appear at the Respondent's office in Union hats and jackets to file applications, the Respondent changed, in part, its regular hiring practices and set up a panel or bench of prospective employees and, with one exception, these union affiliated applicants never made it past manager Hilty's initial, subjective screening process, a process in which the applicant salary made on prior jobs was said to be a prominent criteria. Thus, if the applicant honestly reported his prior Union scale wage level, he would automatically be excluded from further consideration because that wage would be in excess of the Respondent's wage levels (Turner's last wage was \$15 an hour and the previous one was \$20 but he also put \$12 an hour as the salary desired). The "practical effect" of the Respondent's application review practice precluded selection for interview and employment of Union members and supports an inference that the Union applicants were not considered simply because of their Union affiliation, see *P.S.E. Concrete Forms*, 303 NLRB 890 (1991).

While Hilty and the Respondent present the appearance of a benign attitude towards union, it is unnecessary for the General Counsel to show blatant actions on the part of an employer in order to demonstrate antiunion animus. As discussed below, the Respondent does not persuasively show valid reasons why it did not consider union applicants for interviews or employment.

The record thus shows that the Respondent essentially ignored it asserted new hiring procedure, ignored union affiliated applicant (except for its interview of Turner who, it is noted, is also a minority applicant), while hiring nonunion applicant including "covert" applicants Goughenour (who listed a desired wage of \$14 an hour and past "operator" salaries of \$13.50 to \$11), and Rodgers (a referral by Goughenour who listed past "operator" salaries of \$14 to \$10 an hour and requested \$14). Thus, only Union experienced applicant's who lied about their past union involvement could hope to be hired and I find that this demonstration of disparate treatment between these two classes of applicants is sufficient to support an inference of animus.

In addition to the factors discussed previously, it is well established that in cases that require an evaluation of an employer's motivation the Board properly may draw reasonable

inferences from both direct and circumstantial evidence. See for example, *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 559 (5th Cir. 1982) which states:

[1] The Company clearly violated section 8(a)(3) if it refused to hire Newman because of union considerations. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183-86, 61 S. Ct. 845, 847-848, 85 L. Ed. 1271 (1941). The principal question is whether the employer was motivated by antiunion animus. *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 697 (8th Cir. 1965). Intent is subjective and in many cases can be proved only by the use of circumstantial evidence. In analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference. It may also choose between fairly conflicting views of the evidence, but it cannot rely on suspicion, surmise, implications, or plainly incredible evidence. *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75-6 (8th Cir. 1969).

Here, I find that the employer may have had a benign attitude toward persons who were member of the USWA or UMWA union, however, that does not preclude a finding of antiunion animus directed at those in a different union, such as the specialized operating engineers in Local 66 and I find that the timing of its partial change in its hiring practices and its refused to hire Local 66 operating engineer applicants, shortly after a large number of their members suddenly started to show up and apply for advertised positions, specifically supports the reasonable drawing of an inference that the refusal to hire was motivated by antiunion considerations directed at operating engineer members of Local 66.

Here, the Board has affirmed my findings that the Respondent engaged in independent violation of Section 8(a)(1). This is conduct that can be used to shed light on the motive for the Respondent's other conduct in refusing to hire operator's Local 66 union applicants. An additional 8(a)(1) violation was found by the Board concerned protected concerted activity by employee Rodgers (a covert applicant), circulating a petition (that did not mention the Union), about working conditions. This is a violation of the Act that reasonably tends to interfere with an employee Section 7 rights regardless of a specific antiunion relationship. More significantly, the other affirmed findings of 8(a)(1) violations of the Act include (1) interrogation of an applicant and an employee about union membership and union activity and (2) creating the impression that an employee's union activities were under surveillance. Accordingly, I find that that the circumstances concerning the Respondent's treatment of these applicants and employees properly allow the inferences of animus as to Union Local 66 applicants.

Based on the Board's decision herein, I disavow my prior citation of *Merit Constructors* and *Great Dane Trailers*, supra and, specifically, the entire paragraph which refers to "past experience at union wages," and finds "implicit" animus, I note, however, that some applicant-witnesses explained, in Hilty's presence at the hearing, their past employment with union contractors and the wages they received and had listed on their applications. Thus it can be deduced that an approximately \$19 an hour wage rate was the "union wage" at the time of their employment. It also is noted that any claim by Hilty that he did not have a generalized knowledge of such a rate is not credible in light of the Respondent's own argument that it previously had a project labor agreement with Local 66 and that it was acquainted with prevailing wage jobs.

In any event, the record supports the conclusion that the General Counsel has made a convincing showing that antiunion animus pertaining to Operating Engineers Union Local 66's salting activities motivated its decision not to hire the nine applicant's involved here. Accordingly, I find that the General Counsel has met the applicable three point refusal to hire

criteria and the record will next be evaluated to consider whether the Respondent has met its burden to show that it would not have hired these nine applicants even in the absence of their Operating Engineers union activity or affiliation.

5 D. *Hiring absent antiunion motivation:* On brief the Respondent primarily addressed the General Counsel's showing relative to the three criteria discussed above and it did not directly present an argument relative to the burden which has shifted to the employer. Elements of its argument, however, are applicable and will be considered. Most specifically, it argues the legitimacy of its wage compatibility policy and argues that the employees it did hire were superior to the nine union applicants it rejected. It also incorrectly argues that it did not discriminate against the union "salts" whom it hired covert union applicants Goughenour and Rodgers.

15 Here, the Respondent had the opportunity to cross examine the applicants regarding their applications and their testimony regarding both their applications and their qualifications. It also called as witnesses human resources director Hilty, dirt operations supervisor Woody Gysygem and owner Clement Gigliotti and it availed itself of the opportunity to explain its own hiring practices and the asserted reasons that Hilty would have hired the persons it did and why it did not (or would not) hire the involved union applicants. The record is adequately developed to allow a fair evaluation of the applicants' qualifications and Respondent's asserted reasons and I find that it is not "necessary" to reopen the record in order to properly consider the proceeding under the *FES* framework and the Respondent's request in this regard is denied.

25 In the prior decision, I found there clearly were jobs available at the time these nine union applicants were not hired; specifically, that between 11 and 15 operators were hired between December 1, 1996 and April 30, 1997. Moreover, Hilty ran an ad for 2 weeks in late November 1996 seeking operators and he testified that he then ran it again because he didn't get a sufficient response, yet he had failed to act on as many as 8 union affiliated applications that he had received between December 3 and 11. At this same time, higher management had talked with Hilty about hiring 9 crews for existing and anticipating 84 Lumber jobs, each with at least four operators. Hilty thereafter was directed to set up benches or panels of 10 operators who would be interviewed, have their physicals and be ready to go to work. After the Union salts applied for the jobs, however, only one panel was set up with a total of six persons (including Turner who nevertheless was not actually hired). Thus, the record shows that the Respondent failed to follow its own hiring plans after being confronted with a series of applications from Local 66 members and I conclude that this is one factor that indicates the pretextual quality of the Respondent's reasons.

40 As quoted above and as stated in the prior decision the record thus shows that the Respondent essentially ignored its asserted new hiring procedure, ignored union affiliated applicant (except Turner), while hiring nonunion applicant including "covert" applicants Goughenour and Rodgers. This prior evaluation applies not only to motivation but also tends to show the pretextual nature of the Respondent's explanation of his hiring practices during the critical period when the nine involved union applicants were denied employment. In this connection, I also previously found that:

Here, I find that Hilty basically was testifying in an abstract sense inasmuch as there is little corroboration of any actual adherence to his alleged practices. Moreover, he admittedly relies primarily on references from known sources (a criteria that as a practical matter also inherently tends to preclude consideration of union affiliated applicants), Hilty did not testify as to what he "did" with these applications but merely offered rationalizations about his

practices. What he actually did was to exclude all suspected union affiliated applicants, except Turner, from further consideration at a time when he hadn't bothered to review information about their experience and had little information about their qualifications. He did, however, generally have available information (that he assertedly disregarded) which showed that most of the applicants had graduated from the Unions apprenticeship program and I find that such training especially when coupled with some showing of experience as an operator with other companies establishes a presumption of basic job qualification that cannot simply be disregarded without at least some further investigation or inquiry.

Turning to a review of the individual applications and the information that Hilty actually was confronted with. I find that the Respondent's asserted reasons for not further reviewing such application, for not arranging interviews with many of the applicants and for not hiring any of them are inconsistent and unbelievable and therefore pretextual.

Applicants Hay, Sisley, Eutsey and Whipkey indicated desired salaries as negotiable, open (blank) and (?). Rice said \$15 an hour and Stevenson wrote "prevailing rate", thus all of this entries were essentially the equivalent of Goughenour and Rodgers, who sought \$14 an hour. Although Schade sought \$18 and previously had made \$21 and Hay and Wratcher had past salaries shown at \$19, without more, it cannot be presumed that a union affiliated applicant would automatically decline employment because of wage expectations. Otherwise, Hilty negotiated the wage levels of those he did hire and no salary was set out in the Respondent's ad. Accordingly, I find that information on past salary or salary desired is not a valid explanation of why the Respondent failed to consider these seven application, see *Norman King Electrical*, 324 NLRB 1077 (1997).

The *Norman King Electrical* decision subsequently was enforced in *Kentucky General Inc. v. NLRB*, 177 F.3d 430 (6th Cir. 1999), and I conclude that the evaluation of the employer's wage comparability issues is not controlled by the cases cited by the Respondent unless the asserted justification otherwise is supported. Although the Respondent argues the legitimacy of its asserted wage comparability policy as a justification for its claims that it would have selected the employees it did hire, rather than the nine union applicants, I do not find its claim to be fully credibly or persuasive.

The Respondent argues that the nine alleged discriminatees had requested wage rates on the relevant part of their application that were too high but Turner requested \$12. Stevenson indicated "prevailing" which I find to reasonable mean the employer's prevailing rate, Hay said "negotiable" Sisley said "open," Eutsey and Whipkey left it blank, which reasonably should be interpreted as meaning open or negotiable, and Rice said \$15. Although Hilty testified that he spent "definitely less" time on each application that he looked at, I do not credit his claim that he wouldn't have known what kind of money some of the applicants were looking for. (For example, Respondent had no trouble interviewing and hiring Robert Rasal on July 29, 1996, shortly before the union applicants sought work, even though he left blank the line for wages sought). Moreover, Hilty testified that when union applicant Hay had written negotiable," Hilty really did not know what Hay was looking for but he then admitted that was not really a problem

(transcript page 538). He also then contradictory said that past experience at \$15 on a "pan" would have been something he would have considered, but, overall, he "wouldn't have considered it at the time." This also is contradicted by Rasal's application, which listed \$15.15 an hour as an operator and was not a bar to his promptly being hired. "At the time" Hilty was under pressure to hire operators and to get others ready on the "bench," and it appears that he clearly would be inclined to consider and inquire if the applicant would accept the wage scale he was willing to offer (a rate not mentioned in the company's ads). I further find that when Hilty then said he wouldn't have considered these applications "at the time," he inferentially referred to the time of the concerted filing of applications by union "salts." This conclusion is supported by the fact that covert applicant Rodgers was hired immediately even though he sought \$14 an hour (but was hired for less), and Hilty admitted that \$14 was "not that far from the range that we would have considered."

Although I believe some partial credence should be given to the Respondent's explanation of its hiring practices, its overall claims are shifting, inconsistent and, viewed in the context of the overall record, untrustworthy and unpersuasive. Accordingly, as discussed below, I cannot find that the Respondent has overcome the General Counsel's showing with respect to its refusal to hire union applicants Hay, Sisley, Turner, Rice and Stevenson.

Union applicants Schade and Wratcher, on the other hand, sought wages of "\$18 an hour and "journeymans," respectively, wage rates that would appear to be well above the range of the Respondent's scale for consideration. Shade, whose application listed a requested wage rate of \$18 an hour testified that he had not worked at a \$12 rate for 15 years and is not accustomed to working for anything like that. He otherwise did not indicate that he would be willing to negotiate and to work for a rate less than \$18 an hour. Wratcher testified that he expected to be paid as a skilled operator, that is a "journeyman" operator rate, that any unskilled operator would get something like minimum wage, and that \$14 an hour was "a little more than minimum wage." He otherwise did not indicate that he would accept a \$12 and \$14 an hour rate and I conclude from his ambiguous testimony on this subject that it is unlikely that he and the Employer would have negotiated a mutually acceptable rate that would have led to his being hired. Accordingly, I am persuaded that the Respondent has shown that it would not have hired Shade or Wratcher during the time period involved even in the absence of their union affiliation.

As noted, applicants Eutsey and Whipkey left the wage sought portion of their applications blank and I find that the Respondent has not shown a legitimate wage related reason for not hiring either of them. The Respondent's ad, however, does seek "experienced" operators and both Eutsey and Whipkey lacked significant experience. As argued by the Respondent, most of the operators that it did hire were experienced and, under these circumstances, I am persuaded that it's unlikely that it would have selected Eutsey and Whipkey for hire when other more experienced and qualified operators were available. Accordingly, I conclude that the Respondent has shown that it would not have hired these two union affiliated applicants during late 1996 early 1997, even in the absence of their union affiliation.

Otherwise, I can not find the asserted reasons to be credible when the remaining alleged discriminatees are considered and I conclude that the Respondent otherwise discriminatorily applied its asserted criteria by excluded them from employment.

In the prior decision I found that:

Moreover, when the Respondent's owner, Clement Gigliotti, testified that he never instructed his staff not to hire union personnel, he specifically added that he probably preferred Union people because he believes that 70 percent of

them would be “qualified” as compared with 20 percent for applicants “off the street.” Accordingly, Hilty described practices in the winter of 1996;1997 appears to be inconsistent with the Respondent’s usual evaluation of an applicant’s suitability.

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On brief the General Counsel also points out that owner Gigliotti specifically testified that he probably preferred union people because:

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I look at everything on a matter of risk. And if I hire ten people, that have some kind of Union affiliation, my chances is getting seven of those that are qualified, as opposed to ten men off the street without an affiliation, then I’m going to get two out of the ten.

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The Respondent argues on brief that the several union applicants would not have been hired in lieu of those it did hire. The record, however, fact to persuasively back up these arguments and its contentions and the testimony of its principal witness, Hilty, are inconsistent with owner of the Respondent’s own evaluation of the suitability of experienced union operators and I reject Hilty’s reasons and find that these arguments and the asserted justifications are not credible.

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In the prior decision I stated that:

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In a similar vein, I find that the Respondent assertion regarding equipment operating experience is inconsistent or otherwise unbelievable. Turner, Rodgers and Goughenour listed experience as “operators” and were hired or at least called for an interview. Rice and Stevenson were both experience “dirt” equipment operators, Sisley and Eutsey listed past experience as operators, Eutsey also said loader (similar to a highlift), Hay had loader and pan and Schade had crane and trackhoe listed. Although Whipkey had listed oiler and drive for his last three jobs it appear that Goughenour duties when hired included both driving a large truck and operating the trackhoe and otherwise Whipkey had past experience in operating dozers, highlights and backhoes, thus, he reasonably could be considered to have the “experience” specified in the Respondent’s ad.

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Here, the Respondent made no attempt to inquire of any union applicant (except Turner) about their specific experiences or skills, dispute their apparent qualifications and basic experience.

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In relation to the “requirement” of the Respondent’s ad, the information relative to qualification refers only to “experience necessary,” with a logical tie in with experience as an operator with the operation of a crane, dozer, backhoe or highlift equipment being of further interest.

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The Respondent made no meaningful review of these union connected applications and it had no disqualifying knowledge at the time it rejected the applications for further review and I find that its explanation in this respect appears to be merely seeming plausible “after the fact” reasons and I find that they are pretextual and indicative that the real reason that the applicants were not considered was their Union affiliation.

I believe that the findings and conclusions previously made fully support the conclusion that applicants Hay, Rice, Sisley, Stevenson and Turner were not hired because of discriminatory reasons, not the reasons offered by the Respondent, and the record is replete with other evidence which shows that the Respondent reasons for not hiring the five alleged discriminatees are not consistent with its past practices and are not credible or trustworthy.

Among other points, the records shows that the Respondent hired a pan operator (as listed in his interview report), after union applicant Turner was interviewed (and described as a pan operator who also ran dozers and the track hoe), on January 22 when it hurriedly (in one-day), hire Burton as an operator. Moreover, Burton thereafter was downgraded to laborer status because (the testimony of supervisor Gysigen), Burton and the other operator at the Front Royal job site (Dunseth), couldn't "carrying grade" for the required site work. It also is noted that Burton was needed as operator at Front Royal and was hired over Turner or the others who had already applied despite the fact that Burton has last worked as an operator in March, 1994.

The Respondent also claims the residency of applicant as a criteria but this also is unpersuasive and inconsistent inasmuch as no explanation appears to be applicable to union applicant Rice who lived in Monogahela where the Respondent had a major landfill operation (and hired an apparent non union operator, Goughenour), and operated a regular 12 hour shift, yet refused to interview or hire Rice.

On brief, the Respondent claims Ross was hired as a carpenter yet general superintendent Rush testified that, Ross was hired to operate a rubber tire backhoe but thereafter was "grounded" because he couldn't run it. Here, I infer that the fact that some persons hired as operators did not work out and were transferred to other classifications even further suggest that these operator positions were available but were not being offered to union applicants. Also, while I conclude that new hires Bob Bargante and Lawrence Poling were hired as a foreman and laborer, respectively, it otherwise appears that the following persons were hired as equipment operators between December 1, 1996, and March 30, 1997:

NAME	DATE OF APPLICATION	DATE OF INTERVIEW	DATE OF HIRE
Ralph Bailey	2/24/97	2/24/97	2/24/97
Mark Burton	1/22/97	1/22/97	1/22/97
Mark Clarke	3/31/97	3/15/97	3/18/97
Wm Goughenour	2/17/97	2/24/97	2/24/97
Mike Kelly	1/23/97	2/3/97	2/3/97
Rick Litton	11/26/96	12/13/96	12/18/96
Jeff Maund	None	3/7/97	3/10/97
Jerald Rogers	2/25/97	2/25/97	2/25/97
Jim Rush	None	2/20/97	2/22/97
Brian Ross	2/11/97	2/11/97	2/12/97
Joe Spina	3/15/97	3/15/97	3/17/97
Robert Tedrow	12/18/96	1/4/97	1/9/97
Dave Zehr	1/23/97	2/3/97	2/6/97

Hay, Rice, Stevenson, Sisley and Turner were all highly experienced (despite their lack of boom crane experience) and they each indicated that they were looking for and willing to work for a negotiated wage at or near the scale paid by the Respondent. The Respondent, however, through Hilty, rejected the union applicants, while at the same time hiring other operators with questionable qualifications and the Respondent attempting to transfer Rodgers

from the Flexsys job site to an 84 Lumber site and it terminate Goughenour from the landfill job, with no apparent plan to replace them even though it did not have enough landfill operators and was working those it had in 12 hour shifts.

5 On brief, the Respondent attempts to minimize the full extent of its hiring and the duration of its work for 84 lumber. These are some of the details that properly can be addressed at the compliance stage of this proceeding. Here, the Respondent had equipment operators at other than its 84 Lumber job sites. Dirt supervisor Woody Gysygen testified that:

10 We had a major size dirt moving operation at Kelly Run Sanitary Land Fill. We had smaller operations going at several of the chemical plants in the valley, Coppers being one of them. There was a lot of work being done, small jobs around coal mines, and we were doing quite a few new sites for 84 Lumber over various states.

15 I don't remember the exact number, but there were at one time there were six going at one time. So, I would say, we probably were on ten or twelve before the thing was over with.

20 There was supposed to be more. There was a lot more that we had talked about.

Accordingly, the record shows that there were more than five operator positions available, jobs that were filled but which were denied the alleged discriminatee for no legitimate reasons.

25 Even if the boom truck and crane positions are excluded at least 10 or 12 equipment operator positions were available for the remaining five highly qualified and willing union applicants. Under these circumstances, I find that the Respondent has not persuasively shown that alleged discriminatees Hay, Sisley, Turner, Rice and Stevenson did not meet its specific criteria for positions or that they otherwise were unqualified or not as well qualified as the majority of the 13 operators those were hired. I find that the Respondent's asserted reasons for not hiring these applicants are not credible and I find that the policies and practices upon which the Respondent relies to justify its actions are more pretextual than persuasive. See *Moses Electric Service*, 334 NLRB No. 78 (2001), and I again find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation. Accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's unlawfully refused to hire the discriminatees named below for openings filed by other applicants and thereby violated Section 8(a)(3) and (1) of the Act, as alleged.

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Conclusions of Law

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in a pattern or practice of refusing to hire applicants for employment based on their suspected union sympathies, Respondent discriminated in regard to hired in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

4. By interrogating an applicant and an employee about union membership and activity and creating the impression that an employee's union activities were under surveillance by telling him that the company had him on videotape; Respondent has interfered with, restrained, and coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By threatening an employee that his concerted activity in circulating a petition in conjunction with another employee directed at improving working conditions "looked like trouble" and that the employee could "go work somewhere else" if he wasn't happy; Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

V. Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

In accordance with *FES*, supra, and *Dean General Corporation*, 285 NLRB 573 (1987), refusal to hire discriminatees are entitled to a make whole remedy. It is noted that it is well established that when ambiguities or uncertainties exist in compliance proceedings, doubts should be resolved in favor of the wronged party rather than the wrong doer, see *Paper Moon Milano*, 318 NLRB 962, 963 (1995) and *United Aircraft Corp.*, 204 NLRB 1068 (1973). Under these circumstances, it should be found that the qualified discriminatees who were refused employment at a time when their applications were "fresh" see *Eckert Fire Protection, et al.*, 332 NLRB No. 18 (2000), and when the Respondent contemporaneously and discriminatorily hired non union applicants for available positions, would have been hired. Here, the record shows that the five named discriminatees were essentially as qualified as those hired and, as union operators were considered by the Respondent's owner to be better than "men off the street" and that at least 11 new hires were employed, while the Employer also failed to fill vacancies, failed to follow its plans to establish benches of qualified prospective new hires, and worked operators at one job site on 12 hour shifts. Thus, if each of the five union operator had been employed they would constitute approximately one half of newly filled positions. Under these circumstances, it appears that each of the five named discriminatees would have been hired under non discriminatory circumstances and each is entitled to instatement and a make whole remedy, leaving to compliance the determination of any limits on the instatement remedy and the extent of tolling of the Respondent's liability where the Respondent will have the opportunity to show limiting factors, see *Ferguson Electric Co.*, 330 NLRB No. 75 (2000), and *Serrano Painting*, 331 NLRB No. 120 (2000).

It having been found that the Respondent unlawfully discriminated against job applicants John Hay, Patrick Rice, Ken Sisley, Glen Stevenson and Nathaniel Turner, based on their suspected union sympathies, it will be recommended that Respondent offer immediate and full instatement to each discriminatee in the position of equipment operator, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered by reason of the failure to hire them, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the*

Retarded, 283 NLRB 1173 (1987).¹ Otherwise, it is not considered necessary that a broad Order be issued.

On the foregoing findings of fact and conclusions of laws, on the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended²

ORDER

Respondent, Merit Contracting, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating applicants and employees about their union membership and union activity, by creating the impression that employees union activities are under surveillance and implicitly threatening employees with loss of employment because they engage in protected concerted activities.

(b) Refusing to hire job applicants for the position of equipment operator because they are members or sympathizers of the Operating Engineers Union.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Within 14 days from the date of this Order, offer the following discriminatees immediate and full reinstatement to the position of equipment operator for which the Respondent was hiring: John Hay, Patrick Rice, Ken Sisley, Glen Stevenson and Nathaniel Turner, and if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the Remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure and refusal to hire and within 3 days thereafter notify John Hay, Patrick Rice, Ken Sisley, Glen Stevenson and Nathaniel Turner in writing that this has been done and that the failure and refusal to hire will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

¹ Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days of service by the Region, post at its Monongahela, Pennsylvania, facilities and all current job sites copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and job applicants customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceeding, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 3, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

(f) In all other respects the Complaint is dismissed.

Dated, Washington, D.C. August 8, 2001.

Richard H. Beddow, Jr.
Administrative Law Judge

³ If this Order is enforced by a Judgment of the United States of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating applicants and employees about their union membership and union activity, by creating the impression that employees union activities are under surveillance and by implicitly threatening employees with loss of employment because they engaged in protected concerted activities.

WE WILL NOT fail and refuse to hire job applicants for the position of equipment operators because they are members or sympathizers of the Union.

WE WILL NOT in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order offer John Hay, Patrick Rice, Ken Sisley, Glen Stevenson and Nathaniel Turner employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner specified in the section of the Administrative Law Judge's Decision entitled "The Remedy."

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful failure and refusal to hire John Hay, Patrick Rice, Ken Sisley, Glen Stevenson and

Nathaniel Turner and within 3 days thereafter notify each of them in writing that this has been done and that the failure and refusal to hire will not be used against them in any way.

MERIT CONTRACTORS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1000 Liberty Avenue, Room 1501, Pittsburgh, Pennsylvania 15222-4173, Telephone 412-395-6899.